IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 12 OF 2003.

1. Shri Anil Mahadev Mane,
   Aguada Central Jail.
2. Shri Mohan Singh Rajput,
   Aguada Central Jail.
3. Shri Ulhas Naik,
   Aguada Central Jail. ... Appellants.

Versus

State through Public Prosecutor. ... Respondent.

Mr. F.N. Tavora, Advocate for the Appellants.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : P.V. HARDAS, J.

Date : 12th September 2003.

ORAL JUDGMENT.

The appellants/original accused 1, 5 and 7, who stand convicted by the IInd Additional Sessions Judge, Panaji, by Judgment, dated 27th November 2002, in Sessions Case No. 37 of 2000, for an offence punishable under Section 395 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 6 years and to pay fine of Rs. 5,000/- each, in default to undergo rigorous imprisonment for one month, have filed the present appeal challenging the aforesaid conviction and sentence.

2. The facts in brief as are necessary for the decision of the appeal are set out hereunder:-

P.W.12 P.I. Jaiprakash Nagvenkar, who was attached to the Ponda Police Station, received a complaint, at Exhibit P.W.1/A, from P.W.1 Sadashiv Tendulkar, on 18th March 2000, at 5.30 a.m.. On the basis of the said complaint, P.W.12 P.I. Nagvenkar registered an offence, vide Crime No. 61/2000, under Section 395 of the Indian Penal Code. After registration of the offence, P.W.12 P.I. Nagvenkar proceeded to the scene of offence with the police staff and the police photographer. At the scene of offence, a scene of offence panchanama was drawn, at Exhibit 27, in the presence of P.W.4 Santosh Dhond. From the scene of offence, one koita, three wooden sticks, two iron rods, one knife, one coir rope and four pieces of bedsheet were seized. Photographs, at Exhibit 48, were also taken. Some of the accused came to be arrested on 19th March 2000 and the remaining accused were arrested on 20th March 2000. Vide letter, at Exhibit 57, the Executive Engineer, Ponda, was requested to depute a draughtsman for drawing the sketch of the scene of offence. Vide Exhibit 58, a request was made to the Executive Magistrate for holding the identification parade of the accused. P.W.6 Upasana Mazgaonkar, an Executive Magistrate of Ponda, conducted the test identification parade, on 10th April 2000. The memorandum of the test identification parade is at Exhibit 33. Meanwhile P.W.12 P.I. Nagvenkar had

received a copy of the First Information Report lodged at Sindhudurg Police Station by the appellant no. 3/original accused no. 7, on 18th March 2000, at 9.30 a.m.. The said First Information Report is at Exhibit 59. The original accused no. 2 Ibrahim Shaikh is alleged to have made a disclosure statement leading to the recovery of the knife at the residence of P.W.1 Sadashiv. The said panchanama is at Exhibit 35. At the instance of original accused no. 3 Santosh Dhawre, 19 currency notes of Rs. 100/- each and a small page of a diary came to be attached from a dilapidated hut situated behind the hut of the said accused. Exhibit 43 Colly is the said panchanama. At the instance of appellant no. 3/original accused no. 7, one empty bottle of "Directors Special Whisky", surgical right hand glove slightly torn and one empty polythene cover of "Kohinoor beedies no. 75" came to be attached from a hillock of cashew plantation, vide panchanama at Exhibit 38 Colly. At the instance of the appellant no. 3/original accused no. 7 one finger ring of gold with white stone with the name ‘Satish’ on the inner side and one pair of earrings of imitation gold and diamond came to be attached from a garage by the side of the house of appellant no. 3/original accused no. 7, vide panchanama at Exhibit 45 Colly. The finger prints lifted from the scene of offence were found to be unfit for comparison, vide letter at Exhibit 61 Colly, issued

by the Director, Grade I, Finger Print Bureau, C.I.D.M.S. Pune. A charge-sheet against the appellants and other four accused came to be filed.

3. On committal of the case to the Court of Sessions, charge, vide Exhibit 6, against all the seven accused, including the three appellants, came to be framed by the Sessions Judge, Panaji, for an offence punishable under Section 395 of the Indian Penal Code. The prosecution in support of its case examined 12 witnesses. The defence of the accused, including the appellants, is of denial. The learned trial Court, on consideration of the evidence of the prosecution, convicted and sentenced the accused, including the appellants, as aforestated.

4. P.W.1 Sadashiv states that, on the day of the incident, he alongwith his wife P.W.3 Shalini Tendulkar and his uncle P.W.2 Somnath Dabolkar were residing in the house. On the day of the incident, his son Prashant alongwith his wife had gone to Sirsi and his second son Satish alongwith his wife were in Ponda while his youngest son Nitin had gone to Bombay. He further states that his house is situated about one kilometre away from the main road. On the day of the incident, that is, on 17th March 2000, he went to bed around midnight. His wife P.W.3 Shalini was sleeping in

another room while his uncle P.W.2 Somnath was sleeping in the third room. At about 1.00 a.m. he heard the noise of something falling in the verandah next to his bedroom. On hearing that noise, he peeped outside the window and inquired if any one was there. He, however, did not receive any reply to his query. Through the window he saw someone going away from the verandah with his face covered. He realized that it may be one of his labourers by name Gopal and, therefore, he called out aloud in the name of Gopal and had asked him as to why he had come to his house so late in the night. Since he did not get any reply, he came out of the house. As he came out of his house, he saw four persons standing with their faces covered with masks. The said four persons were in the age group of 25 to 30 years. Thinking they were thieves, he raised shouts 'chor chor'. The said four persons suddenly came near him and caught hold of him. He tried to extricate himself and entered his house. At that time he saw two more persons also with their faces covered coming towards him. They too came and caught hold of him. One of them gagged his mouth and told him not to make any noise as otherwise they would assault him. The said persons then took him inside the house and one of them ordered another person to cut the telephone wires. Accordingly, the telephone wires were cut. P.W.1 Sadashiv was, thereafter, asked by the said intruders to hand over cash and jewellery.

P.W.1 Sadashiv told them that he did not have cash or jewellery at home, but, they told him that they knew that he was having cash and jewellery. One of the intruders told him that he knew his second son, who resides at Ponda and who is an Advocate. One of the intruders brandished a knife. In the meanwhile two of the intruders brought P.W.3 Shalini from the room where she was sleeping and made her lie down and one of them removed the gold bangles, which she was wearing. The intruders removed four gold bangles from the hands of P.W.3 Shalini. According to P.W.1 Sadashiv, the intruders, as soon as they had entered the house, had switched on the electric lights in the house. Hearing the commotion, P.W.2 Somnath also came there. The intruders attempted to remove the gold ring from the finger of P.W.2 Somnath but, P.W.1 Sadashiv told the intruders that P.W.2 Somnath was a guest and, therefore, they should not remove the ring. P.W.1 Sadashiv was then taken to the first floor bedroom and was asked to hand over the keys of the cupboard. P.W.1 Sadashiv told the intruders that he did not have the keys of the cupboard, but they insisted that he hand over the keys. Then he was taken to the room of his second son by name Satish. P.W.1 Sadashiv again told them that he did not have the keys of the cupboard. The intruders then tore a bedsheet and made two strips. They made a noose out of one strip and put it round the neck of P.W.1

Sadashiv. They also brandished the koita. The intruders then threatened that in case P.W.1 Sadashiv did not hand over the keys they would break the cupboard. He was then taken to the first room and his hands were tied by means of the strips of the bedsheet. His mouth was also gagged by tying a rope round his mouth. With the help of the iron rods, the intruders broke the cupboard and removed one gold locket, a gold necklace and some silver utensils from the cupboard. The intruders then went to the room of Satish, where they broke opened the cupboard and removed some articles from the cupboard. The intruders had also broken the cupboard in the room of the youngest son of P.W.1 Sadashiv by name Nitin. P.W.1 Sadashiv was successful in untying himself but, since the intruders were moving around in the house, he remained on the first floor. P.W.1 Sadashiv has further stated that, during the incident, as the intruders were breaking the cupboard, the cloth covering their faces had partly or fully slipped down so as to enable P.W.1 Sadashiv to see their faces. P.W.1 Sadashiv has identified the appellant no. 3/original accused no. 7 Ulhas as the accused who had brandished the knife and koita. He has also identified the other accused as the intruders who had come to his house. On ascertaining that the accused had left his house, he came down to the ground floor and it was about 2.30 a.m.. He found that the hands and feet of his wife

P.W.3 Shalini were also tied with pieces of the bedsheet. There was a gag on her mouth. P.W.2 Somnath had also been tied to the cupboard with pieces of the bedsheet. He untied both of them and by that time P.W.5 Prakash Gaonkar, a labourer residing near his house, came there. P.W.5 Prakash informed him that he had been given a fist blow by one of the intruders and had also been tied. Two of the intruders had kept a watch on him while the rest had proceeded to the house of P.W.1 Sadashiv. Cash amount of Rs. 98,000/- plus Rs. 2,000/- and some coins, which were in the pocket of the coat, were also taken by the intruders. Meanwhile his son Satish came to the scene of offence. Thereafter he informed the police and the police recorded his complaint at Exhibit P.W.1/A. He has identified the iron rods, koita and the sticks seized from the scene of offence as also the pieces of cloth with which they were tied. He has also identified the piece of paper on which he had written the denomination of the notes and which was kept with the said currency notes. The said piece of paper is M.O.8. He has also identified M.O.12 a gold ring with white stone belonging to his son Satish.

5. In the cross-examination he has admitted that there is a street light which illuminates the front portion and the right side of his house. He has admitted that he, his wife P.W.3 Shalini and his uncle

P.W.2 Somnath were sleeping on the ground floor. He has also denied the suggestion that the labourers and the pluckers used to frequent his house. He has also admitted that his wife P.W.3 Shalini and his uncle P.W.2 Somnath could also see the persons who had brought him inside the house, since the house was fully illuminated. An omission was brought out in respect of the report, at P.W.1/A, that he had not stated to the police that the cloth covering the faces of the intruders had partly or fully slipped down enabling him to identify the intruders. Omission in respect of his shouting 'chor chor' and other minor omissions were brought on record. He has denied the suggestion that original accused nos. 1 and 7 had been brought to his house for 15 days continuously by the police. He has also denied the suggestion that he was taken to the house of the other accused for search panchanama. He has denied the suggestion that he had identified the accused in the test identification parade because they had been shown to him earlier.

6. P.W.2 Somnath states that, on the day of the incident, P.W.1 Sadashiv, P.W.3 Shalini and he were alone in the house and they were sleeping in separate bedrooms. On hearing the commotion, he came out from the room and with the electric light in the hall, he noticed that P.W.3 Shalini was lying on the ground and

there were 6 persons inside the hall. One of the intruders was removing the gold bangles of P.W.3 Shalini. One of the intruders tried to remove his gold ring but, on being told by P.W.1 Sadashiv that P.W.2 Somnath was a guest, the intruders did not remove the gold ring. However, thereafter, they came and removed the gold ring. He further states that he was taken to a room and his hands were tied behind his back. He has also admitted that the masks of these persons had slipped and that had enabled him to see their faces. He has also admitted to have identified the accused except original accused no. 2, in the test identification parade. In the cross-examination he has admitted that there are several coconut trees in the property around the house of P.W.1 Sadashiv. He has also admitted that on an average there used to be 10 to 15 labourers working in the property of P.W.1 Sadashiv and some of them are Non-Goans. He has also admitted that some of the labourers were in the age group of 25 to 30 years. An omission was brought in respect of his statement that he had not stated that he would be in a position to identify the intruders.

7. P.W.3 Shalini has stated that on hearing the shouts of her husband P.W.1 Sadashiv, she came out of the room and found 8 to 9 persons had caught hold of her husband. The intruders had removed her gold bangles.

Hearing the commotion, P.W.2 Somnath had come into the hall. Her mouth was gagged and her hands and legs were tied after tearing a bedsheet. Original accused 1, 3, 4 and 7 took P.W.1 Sadashiv near a cupboard and asked him to hand over whatever he had. P.W.1 Sadashiv opened the cupboard and told the intruders to see what was inside and take what they wanted. There was cash of about Rs. 90,000/- in the cupboard, which was taken by the intruders. She then speaks about P.W.2 Somnath being tied to a bed in the room. She further states that the intruders had taken P.W.1 Sadashiv to the first floor and had heard her husband telling the intruders that he did not have the keys of the cupboard. She has further stated that initially when the intruders had entered the house, they had their faces covered but, the masks had slipped, and she had the occasion to see their faces. She has admitted to have seen accused no. 4 prior to the incident. In the cross-examination she has reiterated that she could see the faces of the accused, since their masks had slipped during the course of the incident. According to her, the entire incident had lasted for one and a half hours and during that time she had seen the faces of the accused. In the cross-examination she has stated that about a month prior to the incident she had seen accused no. 4 loitering in the property and had questioned him. Some minor omissions have been brought out in the

cross-examination, which do not affect materially the testimony of this witness.

8. P.W.5 Prakash is a labourer, working in the agricultural farm of P.W.1 Sadashiv. At about 10.00 p.m. he returned to his hut after watching a T.V. programme in the house of P.W.1 Sadashiv. Some time past midnight, he felt someone pulling his bedsheet and, therefore, he woke up and saw 7 persons. The said persons were wearing T-shirts or shirts, black long pants and had covered their faces with masks. The intruders caught his hands and legs and one of them pointed a knife at his chest and told him not to shout. The intruders then tore a bedsheet and tied him to a pole in the hut. One person stood guard while the other accused went to the house of P.W.1 Sadashiv. On being asked his name, he had falsely stated his name as Manohar. However, he found out that the intruders knew his name. One of the intruders gave a fist blow on his mouth. He has stated that accused nos. 1 and 4 had previously come to the property while he was working. At around 4.00 a.m. he untied himself and went to the house of P.W.1 Sadashiv. He narrated to P.W.1 Sadashiv what had transpired. The telephone in the house of P.W.1 Sadashiv was out of order as the wires had been cut. He has admitted having identified the accused in the identification parade held by the Executive

Magistrate. In the cross-examination he has stated that he has never seen the plucking of the coconuts because he never works in the plucking season. He has admitted that the plucking of cashews and mangoes was done by other labourers in the month of May and some of the workers were Goans and some were Non-Goans. He has denied that he has been tutored by P.W.1 Sadashiv and his son Satish to depose in the Court. He has also admitted that accused 1, 2, 4 and 7 have not worked as labourers in the farm of P.W.1 Sadashiv.

9. P.W.6 Upasana, an Executive Magistrate, who had conducted the test identification parade, has admitted in the cross-examination that she did not instruct the Police Inspector to tell the accused persons to bring different sets of clothes with them. She has admitted that the accused and the dummies wore masks but she does not remember the colour of the masks. She has denied the suggestion that she did not give any opportunity to the accused to change their position in the line.

10. Mr. Tavora, the learned counsel appearing on behalf of the appellants, has urged before me that the evidence of P.W.1 Sadashiv that the masks had slipped from the faces of the intruders is highly artificial and cannot be believed. An omission to this effect qua his

First Information Report is brought on record. He has further submitted that one of the accused had been taken to the house of the complainant P.W.1 Sadashiv for the purpose of recovery of the knife. In such circumstances, therefore, the identification of the accused in the test identification parade is meaningless. He has further urged that there are various infirmities in the test identification parade particularly as the same dummies were repeated for the test identification parade held for various accused. It is, thus, submitted that the prosecution has not established the offence beyond reasonable doubt.

11. Mr. Sardessai, the learned Public Prosecutor appearing on behalf of the respondent/State, has supported the Judgment and the conviction. It is true that P.W.1 Sadashiv appears not to have stated in his report at Exhibit P.W.1/A that the masks covering the faces of the intruders had slipped and, thereby, their faces were exposed. The First Information Report is not meant to be a detailed statement. The evidence of P.W.2 Somnath and P.W.3 Shalini is to the effect also that the masks of the intruders had slipped, which had enabled them to see the faces of the intruders. In respect of the evidence of P.W.2 Somnath and P.W.3 Shalini, in this regard, neither any omission has been brought on record nor in the cross-examination. This statement has been

in no way whittled down. Therefore, in the light of the evidence on record, I am not inclined to attach any importance to the omission in the report at Exhibit P.W.1/A, in respect of the evidence of P.W.1 Sadashiv regarding slipping of the masks of the intruders. The incident lasted for one and a half hours in the house and the intruders had switched on all the electric lights in the house. This had given adequate opportunity to P.W.1 Sadashiv, P.W.2 Somnath and P.W.3 Shalini to observe the accused. Even if the test identification parade, because of some infirmities, is discarded, the identification of the accused in the Court by P.W.1 Sadashiv, P.W.2 Somnath and P.W.3 Shalini does not lose its credibility. Since these witnesses had the opportunity of observing the accused, the identification of the accused in the Court cannot be faulted. It is quite probable that during the incident the pieces of cloth that were tied on the faces of the accused may have slipped revealing the faces of the accused. Such a statement is neither improbable nor can it be doubted as a false statement. As held by me earlier, even if the test identification parade is ignored, since the witnesses had an opportunity of observing the accused, the identification of the accused in the Court cannot be doubted. The learned trial Court has, therefore, accordingly held that the statement of the witnesses that the masks covering the faces of the

accused had slipped during the incident cannot be doubted and, therefore, the witnesses had an opportunity of observing the features of the accused.

12. After giving my anxious consideration to the evidence on record, according to me, the finding and conviction passed by the learned trial Court needs no interference. The learned trial Court has properly appreciated the evidence and has recorded its finding of guilt against the accused. The offence of dacoity punishable under Section 395 of the Indian Penal Code is a serious offence and no case is made out for interfering with the sentence that is passed by the learned trial Court. Accordingly, Criminal Appeal is dismissed. The conviction and sentence passed against the appellants is maintained. The appellants to surrender within three weeks. Bail Bonds stand cancelled. Copy of the Judgment be sent to the appellants as they are in jail.

(P.V. HARDAS)
JUDGE.

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